SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 413

DIXIE GREYHOUND LINES, INC., ET AL.,
Petitioners,

vs.

LAMAR C. ATKINSON AND ROSS R. BARNETT

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

To the Honorable Chief Justice and the Associate Justices of the Supreme Court of the United States:

I.

The opinion of the U. S. Circuit Court of Appeals, on first appeal, in this case is reported in 125 Fed. (2) 237, copy of which is filed as Appendix hereto. The decision of the Circuit Court of Appeals in this case on the second appeal, wherein the judgment appealed from was rendered, has not been officially reported, but copy thereof is attached hereto as Appendix.

II.

Jurisdiction.

The date of the judgment to be reviewed was entered June 7, 1944 (R. 175). Petition for rehearing filed and denied June 22, 1944 (R. 220).

Jurisdiction is sustained under the following cases: *James Lanier Bell, Petitioner v. Preferred Life Assurance Society of Montgomery, Alabama,* —— U. S. ——, decided November 8, 1943, 88 L. Ed. Advance Sheets 6; *Magnolia Petroleum Company* v. *Sullivan H. Hunt,* decided December 20, 1943, —— U. S. ——, Advance Sheets, 88 L. Ed. 161; *Irene Brady, Admrx.,* v. *Southern Railway Company,* decided December 20, 1943, —— U. S. ——, Advance Sheets, 88 L. Ed. 189; *William J. Demorest, Jr.* v. *City Bank Farmers Trust Company, Trustee,* decided January 17, 1944, —— U. S. —— 88 L. Ed., Advance Sheets 340; *J. M. Sartor, et al.,* v. *Arkansas Natural Gas Corporation,* decided March 27, 1944, —— U. S. ——, 88 L. Ed., 597, Advance Sheets; *Crites, Inc.* v. *Prudential Insurance Company,* decided May 22, 1944, —— U. S. ——, 88 L. Ed. 989, Advance Sheets.

III.

Statement of the Case.

Reference is made to summary statement of matters involved, *supra,* in the petition for certiorari. Supplemental statements will be made in this brief and argument.

IV.

Specifications of Error.

Errors relied on with reasons for granting writ are fully set forth in petition for certiorari, reference to which is made.

Argument.

Point I.

This Case Is Controlled by the Laws of the State of Mississippi.

The respondent filed this suit in the District Court of the United States although he was a citizen and resident

of Hinds County, Mississippi, might have filed his suit in the Circuit Court of the County in which he resided, and while he had a perfect right under the law to file his suit in the United States District Court on account of diversity of citizenship, he may not thereby escape the Laws of the State of Mississippi. From recently reported cases of this court, the following rules may be deduced: The Federal Courts have no common law as such, and where trials are had in District Courts, the common law must be ascertained from state decisions. The Federal Court must be industrious to ascertain and apply the state law. This is true although the Federal Court may believe the state rule to be erroneous and that a more correct rule should prevail. The Federal Court should use every effort to correctly ascertain the state law. It may look not only to the decisions of the highest appellate court, but to the decisions of intermediate courts, even to the decisions of trial courts, and as a last resort may look to the decisions of Federal Courts held in the state, since such Federal Judges are ordinarily members of the bar of the state, even after a case has been decided by this court, or a United States Court of Appeals, it is the duty of the court to follow a subsequently rendered state decision. The following cases are directly in point: *Erie Railroad Company* v. *Tompkins*, 82 L. Ed. 1188, 304 U. S. 64; *Swift* v. *Tyson*, 16 Pet. 1, 10 L. Ed. 865; *Wichita Royalty Company* v. *City National Bank of Wichita Falls*, 306 U. S. 103, 83 L. Ed. 515; *Russell* v. *Todd*, 309 U. S. 280, 84 L. Ed. 754.

POINT 2.

The Respondent Was Not a Passenger. Petitioners Owed Him No Duty and Are Not Liable to Him for Damages.

Admittedly, the Respondent went to Petitioners' union station at one o'clock in the morning. He was immediately

informed that the bus would not go south until three and one-half hours later, to-wit 4:30 A. M. The night was cold, with snow on the ground. He had been working for sixteen and one-half hours. For purposes of his own, he went to the mezzanine floor of the station, availed himself of the facilities therein afforded, went to sleep upon a bench situated on the mezzanine floor, although persons were not admitted to the mezzanine floor unless such person held a ticket. The Court of Appeals in its opinion held that Respondent went into the station, walked to the ticket window, held up $1.00, requested the agent to give him a ticket, to which the agent replied the bus would not go south until 4:30. This statement in the court's opinion is contrary to the undisputed proof. Respondent did go to the window, asked what time the bus went south, but according to the undisputed proof did not ask for a ticket or indicate in any manner that he wished to purchase the same. The ticket agent gave him the information called for, which was not an infrequent inquiry, but was not aware of the fact that he intended to remain in the station until the bus arrived. (R. 25; R. 38; R. 40; Billingsley Cross-examination, Supplemental Record R. 2-8, R. 161-168). This question has been determined adversely to Respondent by the Supreme Court of Mississippi. The case of *Andrews* v. *Y. & M. V. R. Company*, 86 Miss. 129, 38 So. 773, is controlling. There, the appellant went to the station two hours before the arrival of the train. The agent let him come on the inside where he could have a warm, quiet place to do some writing. He and the agent got into an argument, as the result of which the agent assaulted the appellant. It was conceded that the appellant intended to take a train upon its arrival. The Court held that there was no liability, using the following language: "Appellant, according to his own statement, did not resort to the depot for the purpose of *then* securing passage upon a train, nor with the inten-

tion of establishing the relation towards the appellee of passenger and carrier. Giving his statement the most far-reaching effect and the broadest meaning of which his language admits, while his intention was ultimately to take passage when the train not due for several hours should arrive, the prime object of his going to the depot at that hour was that he might have a comfortable and convenient place in which to transact the business of writing up his daily insurance reports—a strictly private matter."

The District Judge, after having directed the verdict for the Petitioners on the first trial, on motion for a new trial, used the following language: "The nearest Mississippi case I have come across is that of *Andrews v. Y. & M. V. R.*, 83 So. 773. When Andrews went to the depot more than two hours before his train was due he was intending to catch the train, but while he was waiting he went into the private office of the agent to do some work of his own and while there he got into a controversy with the agent. The court properly held in that case that the relationship of passenger and carrier did not exist."

The Circuit Court of Appeals justified the conclusion which it reached by citing the case of *Metcalf* v. *Railroad Company*, 52 So. 355, 97 Miss. 455. In that case, the decedent went to the station to take a train due in ten or fifteen minutes. He had a grip in his hand and a mileage book in his pocket. He went into the station, deposited the grip, started out of the station intending to return in a few minutes. As he stepped out of the door, he fell into an excavation, negligently placed there by the railroad company, receiving injuries from which he died. The Court held as a matter of law that he was a passenger. However, the case of *Andrews* v. *Y. & M. V. R. Company*, *supra*, was reexamined and reaffirmed. The doctrine was reexamined by the Supreme Court of Mississippi in the case of *G. M. & N. R. Company* v. *Sparkman*, 180 Miss. 456, 177 So. 760,

wherein the Court used the following language: "A party coming to the railroad station with the intention of taking the defendant's next train becomes, in contemplation of law, a passenger on defendant's road, provided that his coming is within a reasonable time before the time for departure of said train. To constitute him such a passenger, it is not necessary that he should have purchased his ticket, as seems to have been considered by his honor. 1 Fetter, Carr. Pass., Sec. 228. But the purchase of the ticket would probably be considered the highest evidence of his intention. But still it is his coming to the station within a reasonable time before, with the intention to take the next train, that creates the relation of passenger and carrier." In that case, the case of *Andrews* v. *Y. & M. V. R. Company* was cited with approval. It will be noted that the Supreme Court of Mississippi has definitely decided that the person, in order to become a passenger, must go to the station, *then* intending to take a train; not a person going to a station who is tired and worn out who wishes to use the lavatory and wash up and take a nap and rest until the train comes in three hours and one-half later. In the case of *Thomas* v. *Bush,* (Mo.) 200 S. W. 301, the court used the following language: "It is said in the case of *Sweany* v. *Railroad*, 167 Mo. App. loc. cit. 141, 151 S. W. 198: 'A depot building is not maintained as a rooming house or lounging place. It is intended as a waiting room for passengers for the reasonable time which should be allowed passengers for coming to it and making ready to depart on an in-coming train, or to wait for delayed trains.' In order for the relation of passenger and carrier to exist in cases of this kind it is necessary that the intending passenger come to the station, and within the implied care or control of the carrier, a reasonable time before the departure of the train by which he is to travel. The right to enter and remain at a railroad station extends only so

far as is reasonably necessary to secure to the traveler the full and perfect exercise of his right to be carried upon the cars, and what is a reasonable time will depend upon the circumstances of each particular case; one's right to remain at a railroad station depends on his intent to take a train *expected soon to leave.*

We have made as an Appendix to this brief the Mississippi Statute regulating the time within which stations must be kept open for passengers prior to the arrival of the train. By analogy, the rule would be applicable to respondent. In the opinion of the Circuit Court of Appeals, it is stated that respondent was known to persons in Jackson and was in the habit of purchasing a ticket every night in the bus station. The respondent was unwilling to state that Billingsley knew who he was and stated that he did not know Billingsley's name (R. 38). Billingsley swore undisputedly that he had no knowledge of ever having seen respondent in the station and a large number of persons passed through and were waited on every night. The Circuit Court of Appeals, in its opinion, called attention to the fact that respondent testified that while he was on the mezzanine floor Billingsley came to him, asked him where he was going, and told him he had until 4:30 to get his ticket. This statement was in direct conflict with respondent's testimony when examined under the equity rules, was contradicted by Billingsley and was at variance with every fact and circumstance in the case; but even if such statement is assumed to be true, under the case of *Andrews* v. *Y. & M. V. R. Company,* the agent did not have authority to convert a trespasser or licensee into a passenger, and at the utmost, Respondent was a mere gratuitous licensee, subject to eviction at any time without cause or notice. *Carson* v. *State,* 123 Miss. 702, 86 So. 460; *Belzoni Oil Works* v. *Y. & M. V. R. Company,* 94 Miss. 50, 47 So. 468. In the case of *Andrews* v. *Y. & M. V. R. Company,* supra, the agent knew that the

appellant had come into the station to await the arrival of a train and consented thereto as fully as he might but could not bind the appellee.

POINT 3.

Billingsley, the Night Ticket Agent, Was Without Authority to Arrest or Prosecute the Respondent, if in Fact He Did so, which Is Denied.

Billingsley was merely a night ticket agent, was on duty eight hours engaged in selling tickets and looking after the building. It was his duty to see that persons remaining in the station between one o'clock A. M. and seven o'clock in the morning should be provided with tickets. If such persons were not so provided, it was his duty to call a policeman and acquaint such officer with the actual facts. He would expect, however, that the officer would ask the person to buy a ticket or leave the station. Billingsley had never before had anyone arrested or instituted a criminal proceeding of any kind. It appeared that upon one occasion, under similar circumstances, he had telephoned for a policeman. It does not appear, however, that an arrest was made under such circumstances. These facts appear undisputed from the direct testimony of William D. Billingsley (R. 52); Cross-examination of Billingsley, Supplemental Record, and the testimony of A. J. Emory (R. 100). This testimony was not disputed. The U. S. Circuit Court of Appeals was critical of Mr. Emory's testimony because it said that it consisted of conclusions of law. We submit, however, that no objection was made by opposing counsel thereto in the trial court. The District Judge interposed no objection, and if Mr. Emory's testimony was composed in part of conclusions of law, the same was developed by Respondent's counsel to the same extent as by Petitioners'. There is nothing to reflect upon his testimony, and we submit that

the objection is without justification. Under the decisions of the Supreme Court of Mississippi, Billingsley was without authority to cause the arrest of the Respondent or institute criminal proceedings against him. Under the law of the State of Mississippi, it was not necessary for Petitioners to negative the lack of authority on the part of Billingsley to arrest or prosecute Respondent. Upon the other hand, the burden of proof throughout the case rested upon Respondent to prove by the preponderance of evidence the authority upon the part of Billingsley to have him arrested or prosecuted. In the case of *Brown* v. *Kisner*, 6 So. (2) 611, 192 Miss. 746, the Supreme Court of Mississippi held that a plantation manager, having in charge the plantation with all of its properties, and who had control of the tenants upon the property, was without authority to have arrested or institute criminal proceedings against a person, without permission, coming upon the place and removing tenants without paying the debts of such tenants. In the case of Fisher v. Westmoreland, 101 Miss. 180, 57 So. 563, it was held that an agent in charge of the principal's property, with authority to care for and sell the same, could not render the principal liable for causing a person to be arrested for stealing the same. In the case of *Russell* v. *Palentine Insurance Company*, 106 Miss. 290, 63 So. 644, it was held that a fire insurance company was not liable for the act of its state agent charged with the duty of collecting agency balances who instituted criminal proceedings against a defaulting agent. In the case of *Young* v. *Price Mercantile Company*, 167 Miss. 409, 148 So. 643, the Supreme Court held that the principal was not liable for the act of a state manager in charge of its property who caused a person to be arrested for theft. And, in the case of *State Life Insurance Company* v. *Hardy*, 195 So. 708, 189 Miss. 266, the Court held that a life insurance company was not liable for the act of a state agent, charged with the duty of preserving

its property and collecting its rents, for instituting criminal proceedings against a tenant for removing agricultural products from the premises. The foregoing decisions rest upon the philosophy that the authority of an agent to cause the arrest or prosecution of a third person must be express or necessarily implied from the duties of the agent.

POINT 4.

Billingsley, the Ticket Agent, Did Not Instigate the Arrest of the Respondent.

The U. S. Circuit Court of Appeals in this case said in its opinion that Billingsley caused the arrest of Respondent by calling the policeman. The test is not whether Billingsley called the policeman and the arrest of the Respondent subsequently resulted. The test is as to whether or not Billingsley instigated the arrest or prosecution of Respondent, and the evidence is undisputed that Billingsley did neither. According to the testimony of Billingsley, and the two policemen who answered the call, Fitzpatrick and Hines, upon their arrival Billingsley said, pointing out Respondent, "He won't buy a ticket, he won't get out." According to the testimony of Respondent, the only thing Billingsley said was "Here is a man who has been loafing around here for several days." It was admitted that Billingsley did not charge the Respondent with any crime, since loafing around the station was not a crime, he did not ask the policemen to arrest Respondent, and he did not ask the policemen to prosecute Respondent. Taking the testimony of Respondent, the only thing which Billingsley said was "The man has been loafing around here for several days." That was no crime, and that is all Billingsley did, according to the testimony of Respondent himself. The policemen testified undisputedly that they were not satisfied with the Respondent, that he appeared to be under the influence

either of intoxicating liquors or a drug, and that he refused to give any account of himself and they took him to the station for an examination. It may be that the policemen were wrong. Be that as it may, it was undisputed that such action as that which took place was not done at the request or suggestion of Billingsley. Atkinson, r. 27; Billingsley, r. 56-58; Supplemental Record, r. 2-6, R. 162-166; Fitzpatrick, r. 75; r. 88; J. B. Hines, r. 90-98. In order to instigate an arrest, more is required than the mere calling of an officer. In order to instigate an arrest, the party charged therewith must have charged the party with a crime and request his arrest therefor. The rule is aptly stated in Rest. of Law of Torts, Vol. 3, Page 383, where the following rule is announced: "The giving of the information or the making of the accusation however, does not constitute a procurement of the proceedings which the third person initiates thereon if it is left to the uncontrolled choice of the third person to bring the proceedings or not as he may see fit." The following authorities are directly in point: Am. Jur., Sec. 33, p. 375; *Rush* v. *Buckley*, 100 Me. 322, 61 A. 774, 70 L. R. A. 464, 4 Ann. Cas. 318; *Barker* v. *Stetson*, 7 Gray (Mass.) 53, 66 Am. Dec. 457; *Shinglemeyer* v. *Wright*, 124 Mich. 230, 82 N. W. 887, 50 L. R. A. 129; *Tillman* v. *Beard*, 121 Mich. 475, 80 N. W. 248, 46 L. R. A. 215; *Gifford* v. *Wiggins*, 50 Minn. 401, 52 N. W. 904, 18 L. R. A. 356; *Boeger* v. *Langenberg*, 97 Mo. 390, 11 S. W. 223, 10 Am. St. Rep. 322; *Whaley* v. *Lawton*, 62 S. C. 91, 40 S. E. 128, 56 L. R. A. 649; *Smith* v. *Clark*, 37 Utah, 116, 106 P. 653, 26 L. R. A. (N. S. 953, Ann. Cas. 1912B, 1366; *Marks* v. *Sullivan*, 8 Utah 406, 32 P. 668, 20 L. R. A. 590; *Langan* v. *Borkowshi*, 188 Wis. 277, 206 N. W. 181, 43 A. L. R. 622; *Gelzenleuchter* v. *Niemeyer*, 64 Wis. 316, 25 N. W. 442, 54 Am. Rep. 616; Annotation: 18 L. R. A. 356, 357; 10 Am. St. Rep. 326; Ann. Cas. 1915B 1373; *Vimont* v. *S. S. Kresge Co.*, 291 S. W. 159; *Greaves* v.

Kansas City Junior Orpheum Co., 80 S. W. (2) 228, 229 Mo. App. 663. There are several decision from the Supreme Court of Mississippi deciding what conduct constitutes the instigation of an arrest or a prosecution. These cases are cited in the opinion of the U. S. Circuit Court of Appeals. *Howell* v. *Veiner*, 179 Miss. 872, 176 So. 731. A storekeeper called a policeman, falsely charged two persons with counterfeiting and expressly requested the policeman to arrest the alleged counterfeiters. Such conduct constituted the instigation of a criminal prosecution. In the case of *I. C. R. Company* v. *King*, 13 So. 824, 69 Miss. 852, the depot agent of the railroad company arrested plaintiff while he was a passenger in the defendant's station, delivered him to a policeman, and at the agent's request, the plaintiff was taken to jail where he remained in custody twenty-four hours. There was no question as to the authority of the agent. However, such agent necessarily instigated the arrest. In the case of *Bacon* v. *Bacon*, 76 Miss. 458, 24 So. 968, a physician falsely certified that the plaintiff was insane. Such certificate was made with the view and for the purpose of having her confined in an asylum. In the case of *A. & V. R. Company* v. *Kuhn*, 78 Miss. 114, an agent of the railroad company, having authority to do so, instituted a criminal prosecution against the plaintiff. The plaintiff complained to the superintendent of the railroad company who ratified what the agent had done. In the case of *Laster* v. *Chaney*, 180 Miss. 110, 177 So. 524, the appellee, a private individual, purposely and intentionally preferred charges against the appellant Laster, had him arrested by the sheriff and placed in jail. In the instant case, Billingsley did not do anything except call an officer, with a view to having Respondent ejected from the station unless he bought a ticket. He made no charge against him, did not request that he be arrested and did not go with the policemen to the Municipal headquarters.

He knew that the policemen took the Respondent out of the station but assumed that no action was being taken, and that it was because Respondent did not buy a ticket. We submit that Billingsley did not instigate the arrest or taking to police headquarters of Respondent, though such action may have resulted from Billingsley calling the policemen. Such policemen testified undisputedly, however, that their action was not even occasioned by what Billingsley said and that they acted on their own judgment in view of the circumstances. Even if their judgment was wrong and their conduct unjustifiable, the Petitioners should not be held responsible therefor. The opinion of the Circuit Court of Appeals upon this question is not only contrary to every reported case but stands alone in American Jurisprudence.

POINT 5.

The Decision of the Circuit Court of Appeals Is Contrary to Applicable Decisions of Other Circuits.

Waters v. *Anthony*, 20 App. D. C. 124, *Yakahashi* v. *Hecht*, 50 Fed. (2) 320, 60 App. D. C. 176; *Kinchlow* v. *Peoples Rapid Transit Co.*, 88 Fed. (2) 764, 66 App. D. C. 382, certiorari denied, 301 U. S. 693, 81 L. Ed. 1349; *Telephone Company* v. *Lewis*, 99 Fed. (2) 424, 69 App. D. C. 191. In each of the foregoing cases, it is held that it is the right and duty of any citizen to direct the attention of an officer to the facts in a case and no liability is imposed on the party so informing the officer where such officer is free to use his own judgment and does not act under the compulsion of the informant.

POINT 6.

Petitioners Rule Requiring the Purchase of a Ticket by an Intended Passenger Between One and Seven A. M. Was a Valid Regulation under the Laws of the State of Mississippi, and the Determination thereof Presents a Question of Law and Not a Question of Fact for the Jury.

Central Louisiana Power Company v. *Thomas*, 145 Miss. 358, 110 So. 143; *Mississippi Power Company* v. *Byrd*, 160 Miss. 71, 133 So. 193; *Cosplich* v. *Miss. Power Company*, 164 Miss. 88, 144 So. 38; *G. M. & N. R. Company* v. *Nason*, 174 Miss. 43, 162 So. 85; *Mitchell* v. *Southern Railway Company*, 77 Miss. 917, 27 So. 834; *Teche Lines, Inc.* v. *Lott*, 189 Miss. 490, 198 So. 292.

POINT 7.

Irrespective of the Validity of the Rule, the Respondent by the Payment of Twenty-five Cents Could Have Acquired a Ticket and Avoided the Annoyance and Inconvenience Complained of.

It was his duty, even if Respondent were wrong, to reduce his damages. The proof undisputedly showed that if the ticket was not used, he might present the same at the window and the price thereof would be returned to him. *Y. & M. V. R. Company* v. *Fields*, 188 Miss. 725, 195 So. 489; *Gilbert* v. *Crosby*, 160 Miss. 711, 133 So. 204; *Vicksburg Railroad Company* v. *Ragsdale*, 56 Miss. 456; *Railroad Company* v. *Eckles*, 64 Miss. 204; *Scott* v. *Green River Lbr. Company*, 116 Miss. 524; 77 So. 309.

POINT 8.

The Overwhelming Weight of the Testimony Established the Fact that the Respondent Was Notified by the Ticket Agent that He Must Acquire a Ticket or Leave the Station, and the Failure and Refusal of the Respondent to Acquire a Ticket Is the Sole Subject of Controversy and Occasioned His Removal Therefrom.

We have pointed out to the Court the validity of the regulation and the further fact that even if the regulation was illegal, the Respondent might have saved himself any trouble by purchasing the ticket, the price of which, twenty-five cents, would have been returned to him if the ticket had not been used. Not only that, the bus station was enclosed premises and if the Respondent was notified to purchase a ticket or leave the station, his failure to do so constituted a crime which would have justified his expulsion from the station and even his prosecution. Section 2411, Miss. 1942 Code, makes it a misdemeanor for a person to remain upon enclosed premises after having been requested to leave, a copy of the section is made Appendix to this brief. In the case of *King* v. *Weaver*, 157 Miss. 77, 127 So. 718, the Supreme Court of Mississippi held that a person violating this section was subject to criminal prosecution, and even if acquitted, the defendant was not liable for an arrest and prosecution thereunder. In the case of *Ruhlin* v. *New York Life Insurance Company*, 304 U. S. 202, 82 L. Ed. 1290, where the plaintiff on a former trial gave testimony contradictory of, and at variance with, his testimony at the second trial, and since under the laws of the State of Missouri his credibility was for the jury, the same rule would prevail in the Federal Court. This rule was followed in *Stoner* v. *New York Life Insurance Company*, 311 U. S. 464, 85 L. Ed. 284. Now, in this case,

we have the same state of facts but the Mississippi rule is just the reverse. Under the Law of the State of Mississippi, where right of recovery depends upon the testimony of one witness, and the rule is very strong where such is an interested one, and it shall appear that such witness has in a former trial testified to a contradictory statement of facts or given a contrary statement, recovery may not be had unless such witness is corroborated if the testimony of the witness is contradicted by convincing, disinterested testimony. In such case, it is held that the party upon whom the burden of proof rests has not sustained the burden, that the testimony of such witness is unreasonable and will not support a verdict, or that a verdict based thereupon would be contrary to the overwhelming weight of the testimony, or that a verdict may not stand upon a mere scintilla of testimony. Such question under the rules existing in Mississippi is one of law and not of fact for the jury. The following cases are directly in point: *Sykes* v. *State*, 45 So. 838, 92 Miss. 47; *Montgomery Ward & Company* v. *Windham*, (Miss.) 16 So. (2) 622; *Federal Land Bank* v. *Morris*, 11 So. (2) 210, 193 Miss. 873; *Truckers Exchange Bank* v. *Conroy*, 199 Miss. 301, 190 Miss. 242; *Jakup* v. *Lewis Grocery Company*, 190 Miss. 444, 200 So. 597; *Teche Lines, Inc.* v. *Bounds*, 182 Miss. 638, 179 So. 747; *Thomas* v. *Williamson*, 185 Miss. 83, 187 So. 220; *Y. & M. V. R. Company* v. *Lamensdorf*, 180 Miss. 426, 177 So. 50.

This case falls within the rule announced in *Stoner* v. *New York Life, supra;* and *Ruhlin* v. *New York Life, supra*, and we invoke the rule therein announced that the State law must be followed by the Federal Court. In this case, Respondent, being examined under the Federal Rules, testified to a state of facts, testifying fully and voluntarily in the presence of his counsel, completely exonerating the Petitioners from any liability whatsoever (R. 109-118).

He was not corroborated by any fact or circumstance in the case. Direct and disinterested testimony was introduced contrary to the testimony given by him at the trial. Wm. D. Billingsley (R. 52). The latter had left the employ of the company and was in the Military Service. Billingsley's Cross-examination, Supplemental Record; Fitzpatrick (R. 75); J. D. Hines, Jr., (R. 90); J. R. Smith, (R. 109); McNair; (R. 70). A friend of Respondent testified that he had told him that he had been to the station to spend the night, and when the policemen released him from the City Hall, Respondent walked straight back to the station, purchased a ticket and remained in the station until the arrival of the bus. No other conclusion could possibly be drawn but that the controversy arose over Respondent's refusal to purchase a ticket when he had every opportunity to do so. We respectfully submit that as a matter of law, under the decisions of the Supreme Court of Mississippi, the testimony of the Respondent is against the overwhelming weight of the testimony and no recovery could be had thereupon.

POINT 9.

The Petitioners Were Not Liable for Exemplary Damages and the Court of Appeals Committed Error in that Respect.

The Court of Appeals held that the District Judge should have submitted to the jury Petitioners liability for punitive damages. The evidence is undisputed that Billingsley did telephone the policeman to come to the station. According to his testimony, that of the Respondent when examined under the Federal Rules, that of the two policemen, Billingsley complained that the Respondent had refused to purchase a ticket. Respondent testified that Billingsley merely said to the policemen "This man has been loafing around here several days"; and that he did not

make any charge or any request of the policemen. The testimony is further undisputed that when the policemen came into the building and went to the mezzanine floor that the Respondent was sound asleep, Fitzpatrick, (R. 75-6); Hines, (R. 91). It would be so easy for Atkinson, being asleep, to have misunderstood what Billingsley said, especially in view of his previous testimony as to what Billingsley said. The testimony was further undisputed that Billingsley was not present when the policemen questioned or searched Respondent, did not know that the same took place, and assumed that Respondent was being merely ejected from the station for not acquiring a ticket. Supplemental Record, (R. 1-6). We submit as a matter of law that the Petitioners were not guilty of such conduct as justified the submission of the question of punitive damages to the jury. The decision of the Circuit Court of Appeals so holding is contrary to the following applicable Mississippi cases: *Y. & M. V. R. Company* v. *Hardy*, 55 So. 42, 100 Miss. 132; *Teche Lines, Inc.* v. *Lott*, 198 So. 292; 189 Miss. 490; *Y. & M. V. R. Company* v. *Mullen*, 158 Miss. 774, 131 So. 101; *Bounds* v. *Watts*, 159 Miss. 307, 131 So. 804; *McDonald* v. *Moore*, 159 Miss. 326, 131 So. 824; *Miss. Power Company* v. *Byrd*, 160 Miss. 171, 133 So. 195. The Supreme Court of Mississippi has in repeated cases, as in the foregoing, held that, as a matter of law, exemplary damages were not allowable. The Court held in the case of *Y. & M. V. R. Company* v. *Hardy* that exemplary damages were no part of the compensation to which the plaintiff was entitled, but was punishment for wrong doing in the interest of the public and the personal rights of the plaintiff were not involved. It will be noted that Circuit Judge Waller dissented and was of the opinion that the record did not show any basis for recovery of exemplary damages.

POINT 10.

The Court Was Without Authority under Federal Rules of Civil Practice to Reverse this Case Solely upon the Question of Exemplary Damages. There Should Have Been a General Reversal.

In this case, the court used the following language: "The judgment appealed from is affirmed on cross-appeal. It is also affirmed on direct appeal except as to the issue of punitive damages. On that issue, it is reversed and the cause remanded to the district court for trial *de novo*, and such further proceedings as are not inconsistent with this opinion."

Rule 59, Civil Procedure, contains the following language: "(a) Grounds. A new trial may be granted to all or any of the parties and on all or part of the issues (1) in an action in which there has been a trial by jury, for any of the reasons for which new trials have heretofore been granted in actions at law in the courts of the United States; and (2) in an action tried without a jury, for any of the reasons for which rehearings have heretofore been granted in suits in equity in the courts of the United States."

The Seventh Amendment to the Constitution of the United States contains the following language: "In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law."

The court in its opinion purports to cite authorities sustaining its conclusions that the case may be affirmed as to the judgment for actual damages, with costs, and reversed as to exemplary damages, which would require the petitioners to pay the same, and then that the case be reversed to be tried on the question as to whether or not the peti-

tioners are liable for exemplary damages. It is needless to say that the authorities cited by the court do not sustain the conclusions arrived at. The court cites Moore, Federal Practice, Vol. 3, Page 3248. The text does not state any such rule, and the cases cited in Notes 11 and 12 dealing with the right of the court to grant a new trial for inadequate or excessive damages resulted in a general new trial, though of course the court has authority to require a remittitur as condition precedent to overruling an application for a new trial. The court cites *Schuerholz* v. *Roach*, 58 Fed. (2) 32. The decision does not support the announcement contained in the court's opinion. In that case, where there was a verdict for the plaintiff, though the damages were fixed at an inadequate amount, the District Judge was asked to grant a new trial upon the question of damages alone. This, he refused to do, and his action was affirmed in the last mentioned case from the Fourth Circuit where the court used the following language: "The verdict itself is almost conclusive demonstration that it was the result not of justifiable concession of views, but of improper compromise of the vital principles which should have controlled the decision. The inference is irresistible that it could have been reached only by certain of the panel conceding their conscientious belief that the defendant ought to prevail upon the merits in order that a decision might be reached. It is possible that a trial judge might let such a verdict stand for various reasons, as for instance if on the whole it should appear to him that a verdict for the defendant ought not to have been set aside. But it would be a gross injustice to set aside such a verdict as to damages alone against the protest of a defendant, and force him to a new trial with the issue of liability closed against him when it is obvious that no jury had ever decided that issue against him on justifiable grounds. Although the decision of a motion for a new trial rests within the discretion of the trial court * * * it is a sound judicial and not an arbitrary

discretion which must be exercised. A failure in this regard is subject to revision." The court cites the case of *Gasoline Products Company* v. *Champlain,* 283 U. S. 494, which case not only does not sustain but is opposed to the conclusion reached by the Court of Appeals. It is very true that each of the foregoing cases were decided prior to the operation of the present Federal Rules. It is sufficient to say that there is no reported case where any such conclusion has been reached, and we submit that the action of the court in this respect should not be affirmed without full argument.

The question is one of great public importance. The rule certainly would not apply or justify a reversal upon the question of damages alone. Most certainly it would not require or justify a reversal upon the question of exemplary damages alone. In such case there should be a general reversal. Under the decision of the court, the case would need to be tried *de novo,* that is to say, every fact and circumstance considered by the District Court at the trial of the case would be relitigated. This would impose great injustice upon the Petitioners, if the judgment for actual damages should be affirmed by this Court and paid. Upon the question of the liability of the Petitioners for exemplary damages, every particle of the testimony admissible at the trial of the case on the merits might be introduced, and we submit that it cannot be said with any degree of certainty that a second jury trying the case upon the question of exemplary damages alone would be able to separate the actual damages from the punitive damages. At the second trial, the jury might not be satisfied that the Respondent recovered sufficient actual damages, and an alleged recovery for exemplary damages might be increased thereby; but not only that, as pointed out by the Court of Appeals, Fourth Circuit, *supra,* the verdict rendered in favor of the Respondent against the Petitioners in this case covered every element of actual damages. It is very likely

that there was some disagreement among the jury about the question of Petitioners' liability at all. It is safe to assume that the verdict was a compromise verdict. Therefore, the Petitioners should not be subjected to the injustice of a trial with the same evidence only upon the question of exemplary damages where it may be that a majority of the jury would not even want to award any actual damages. We submit that there is no authority for any such practice and a writ should be granted and the Petitioners heard thereupon.

Rule 59, properly construed, means, we respectfully submit, that there may be a reversal as to some separable point in the case not requiring a trial *de novo,* and the trial of which would not embarrass or injure the opposing litigant by going over the same ground litigated in the former trial. No more species of judicial injustice could be conceived than that justified by the rule announced in this case that the Petitioners pay the actual damages with costs, and then run the gauntlet of litigating the entire case over again *de novo,* with the same proof admissible, leaving it to a different jury to determine, under the guise of exemplary damages, as to whether or not the Petitioners have paid adequate actual damages by reason of the former verdict rendered. We respectfully submit that the writ should be issued upon every ground hereinbefore presented with deference, Rule 38, Paragraph 5(b), of the rules of the court.

Respectfully submitted,

LONGSTREET HEISKELL,
Memphis, Tennessee;
WILLIAM H. WATKINS,
P. H. EAGER, JR.,
THOMAS H. WATKINS,
Jackson, Mississippi,
Attorneys for Petitioners.